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The illusion of uniformity

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Service guarantees and consequential loss under the Australian Consumer Law: The illusion of uniformity

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The aim of the new Australian Consumer Law (ACL) is to 'create a single national consumer law' establishing a uniform set of rules across all jurisdictions in relation to consumer protection. There are, however, exceptions to this uniformity. Although the ACL is a national law, it comes into effect by the activation of separate jurisdiction of the Commonwealth and states and territories. The focus of this article is on one specific aspect of the ACL, namely, the consumer guarantees relating to the supply of services. Importantly, the ACL's uniformity is seriously undermined where there is a failure to comply with the guarantee that services are supplied with due care and skill, where such failure results in personal injury or property damage. Here, state and territory laws that determine liability for careless conduct and that establish relevant defences under the Civil Liability Acts continue to apply. Given that there are considerable differences between the jurisdictions, particularly in relation to the available defences, a uniform national approach therefore does not operate in this context.

Introduction

The new Australian Consumer Law (ACL) came into effect on 1 January 2011. Its stated aim was to 'create a single national consumer law'.[1] The ACL is the response to the perceived shortcomings of the previous, 'relatively fragmented landscape' of Commonwealth and state and territory consumer protection laws.[2] Australia now has a uniform set of rules across all jurisdictions in relation to consumer protection and a uniform articulation of acceptable conduct in the commercial sphere, and one would expect that this will be widely welcomed.[3] There are, however, exceptions to this uniformity, as this article demonstrates. Although the ACL is a national law, it comes into effect by the activation of separate jurisdiction of the Commonwealth and states and territories. The laws are a complex exercise of co-operative federalism, with the Competition and Consumer Act 2010 (Cth) (CCA) inserting the ACL as Sch 2 of the CCA. Section 131 and Pt XI of the CCA applies the ACL as a law of the Commonwealth in relation to *corporations*. Part XIAA of the CCA provides for the application of the ACL as a law of the

* Faculty of Law, Bond University. My thanks go to Rick Bigwood for his meticulous editorial comments. Any remaining mistakes are, of course, my own.

1 Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill No 2 2010, p 3.

2 A Bruce, *Consumer Protection Law in Australia*, LexisNexis Butterworths, Australia, 2011, p 1. The reforms implement the recommendations of the Productivity Commission in its *Review of Australia's Consumer Policy Framework*, Report No 45, Canberra, 2008.

3 See, however, the mixed reception in J Paterson, 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35 *MULR* 252 at 253–4.

states and territories ('states' as shorthand). All states have applied the ACL under their relevant Fair Trading Acts (FTAs).[4] It will take some time for the full implications of these changes to be understood.

The focus of this article is on one specific aspect of the ACL, namely, the consumer guarantees that apply to the supply of goods and services in trade and commerce and, more specifically, the guarantees relating to the supply of services. These statutory guarantees have replaced the previous Trade Practices Act 1974 (Cth) (TPA) which implied terms into consumer contracts.[5] The ACL imposes statutory guarantees in relation to services *supplied* to a *consumer* in trade or commerce and mandates certain quality standards in relation to those services. A failure to fulfil those statutory obligations may be a source of potential liability of the supplier to the consumer. To generalise somewhat, a person is a consumer in relation to a supply of services if the amount paid or payable for the services does not exceed $40,000 or, if it exceeds that amount, the services 'were of a kind ordinarily acquired for personal, domestic or household use or consumption' (s 3(3) of the ACL).

Commonwealth jurisdiction applies where a consumer enters into a contract with a ' corporation', as defined in s 4, or whose conduct otherwise falls within the more extended operation of the CCA under s 6, which defines corporation to *extend* to natural persons in certain contexts. That extended jurisdiction applies in circumstances including where a person provides goods or services in the territories, or in interstate trade or commerce.[6] Hence, if a 'corporation' (in its extended sense) supplies services in trade and commerce to a consumer (or otherwise engages in conduct caught by the ACL), it is bound by the ACL as a law of the Commonwealth via s 131 and Pt XI of the CCA. In relation to natural persons, the applicable law is that of the relevant state jurisdiction in which the services were supplied.[7] If the ACL were truly uniform, it would not matter which jurisdiction, Commonwealth or state, applied or, in the latter case, *which* state law applied. This is especially given the cross-vesting of court jurisdiction between Federal and state courts (Div 8

4 Fair Trading (Australian Consumer Law) Act 1992 (ACT) Pt 2, Div 2.2, inserted by the Fair Trading (Australian Consumer Law) Amendment Act 2010 (ACT); Fair Trading Act 1987 (NSW) Pt 3, Div 2, inserted by the Fair Trading Amendment (Australian Consumer Law) Act 2010 (NSW); Consumer Affairs and Fair Trading Act (NT) s 26, inserted by the Consumer Affairs and Fair Trading Amendment (National Uniform Legislation) Act 2010 (NT); Fair Trading Act 1989 (Qld) Pt 3, Div ision 2, inserted by the Fair Trading (Australian Consumer Law) Amendment Act 2010 (Qld); Fair Trading Act 1987 (SA) Pt 3, Div 1, inserted by the Statutes Amendment and Repeal (Australian Consumer Law) Act 2010 (SA); Australian Consumer Law (Tasmania) Act 2010 (Tas) Pt 2, Div 2; Fair Trading Act 1999 (Vic) Pt 2, Div 2, inserted by the Fair Trading Amendment (Australian Consumer Law) Act 2010 (Vic); Fair Trading Act 2010 (WA) Pt 3, Div 2.

5 For a discussion of the impact of the change from implied terms of contract under the TPA, to statutory guarantees under the ACL, see Paterson, above n 3.

6 See para 6(2)(c). For convenience, I will use the label 'corporation' to include this extended jurisdiction.

7 Indeed, corporations are also subject to state jurisdiction as well as Commonwealth jurisdiction. This is of little consequence, except where there are differences between state and Commonwealth laws, in which case issues of inconsistency then arise. See below 'The Ramifications of s 275'. The state and territory laws operate 'concurrently' with the CCA, so far as they are 'capable' of so operating: s 140H of the CCA. If they are incapable of operating concurrently, then Commonwealth law will prevail by virtue of s 109 of the Constitution.

of Pt XI), so that jurisdictional differences will generally not be of significance under the ACL. However, jurisdiction does matter to the extent to which the ACL is not uniform. Importantly, the ACL's uniformity is seriously undermined in one context, namely, a failure to comply with the guarantee that services are supplied with due care and skill, where such failure results in personal injury or property damage.

ACL service guarantees: Due care and skill

One of the advantages of the ACL is that it requires all service providers, *whether corporate or otherwise*, in all states and territories, to supply services to consumers in trade or commerce in accordance with the statutory guarantees. Under the previous TPA, the implied term that services be performed with due care and skill was not contained in all states' FTAs; specifically, in Queensland and Tasmania, a defendant who was not caught by Commonwealth jurisdiction was previously not subject to any 'due care' implied term.[8]

Section 60 of the ACL provides: 'If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.' Importantly, since s 60 creates a statutory guarantee, plaintiffs can seek damages for failure to comply with the guarantee under s 267 of the ACL, which specifically deals with services. Section 267(1) states:

> Action against suppliers of services
>
> (1) A consumer may take action under this section if:
>
> (a) a person (the *supplier*) supplies, in trade or commerce, services to the consumer; and
>
> (b) a guarantee that applies to the supply under Subdiv B of Division 1 of Part 3-2 is not complied with; and
>
> (c) unless the guarantee is the guarantee under section 60 — the failure to comply with the guarantee did not occur only because of:
>
> (I) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
>
> (II) a cause independent of human control that occurred after the services were supplied.

Subsections (2) and (3) of s 267 are not the focus of this article: they deal with failures to comply with the guarantees that can be remedied (subs (2)); or with failures that cannot be remedied, or are major failures (subs (3), defined s 268), justifying the termination of contracts. Of particular relevance for the purpose of this article is where the careless supply of services leads to personal injury or property damage. Subsection (4) is applicable in that context:

> (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply

8 In those two states, where a person was injured by a non-corporate supplier, such suppliers may still have been subject to contract law implied terms of due care and skill, but a contract could exclude such implied terms or exclude or limit liability for breach of such terms.

with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

(5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

If the failure to provide services with due care and skill leads to foreseeable personal injury or property damage, then compensation for such personal injury is available under s 267 as reasonably foreseeable 'loss or damage'. Section 13 of the ACL includes injury within the definition of 'loss or damage'. Foreseeable injury or damage could well occur in many contexts, for example, the supply of recreational services or repair work of potentially dangerous equipment. Therefore, if a mechanic carelessly performs car repair services to a consumer, causing brake failure, then assuming that personal injury is a foreseeable consequence of such a breach, damages for personal injury would be recoverable under s 267 of the ACL.[9] Consequential losses could also include pure economic loss.[10] Questions have been raised about the precise meaning of, and test for, reasonable foreseeability in this context and about the appropriate measure of damages,[11] but such questions are not likely to impact on the basic proposition here at issue.

Nevertheless, an important question arises in relation to a claim for breach of s 60 and damages under s 267. Despite the promise of greater uniformity as a result of the ACL, ongoing differences between the Civil Liability Acts (CLAs) of the states and territories,[12] and the interaction of those Acts with the ACL, will continue to pose considerable legal challenges in the field of carelessly provided services. Do the CLAs apply in relation to establishing the legal requirements for liability under s 60 and the applicable defences, as well as the applicable principles for calculating damages (including the various limits contained in the CLAs)?

The answer appears to be 'yes'. Since proof of a breach of s 60 requires the

9 The term 'consequential loss' is not used, however, in the ACL; s 267 refers to 'reasonably foreseeable' losses. Under the TPA see, eg, *Crawford v Mayne Nickless Ltd (t/as MSS Alarm Service)* (1992) 59 SASR 490, in which the consumer sued for breach of s 74(2), requiring services to be fit for the particular purposes made known to the supplier by the consumer (cf s 61 of the ACL, discussed below). The services were not suitable: the supply of a burglar alarm system that could easily be disengaged led to recoverable property losses, specifically the large amount of stock stolen by thieves.

10 Eg, under the TPA, *Seeley International Pty Ltd v Newtronics Pty Ltd* (2002) Aust Torts Reports 81-648; Aust Contract R 90-142; [2001] FCA 1862; BC200108270, the careless design of electronic components resulted in fires in houses of the applicant's customers: consequential losses of profit and to business reputation were recoverable.

11 See J W Carter, *Contract and the Australian Consumer Law — A Guide*, LexisNexis Butterworths, Australia, 2011, at [2.23]. In particular, one issue is how such a broadly stated test, which allows for the recovery of '*all loss or damage* caused by the failure to comply with a consumer guarantee, other than loss which could not have been foreseen' (p 37), can apply to strict duties such as contained in s 61 (see below). Such a broad statement of liability is analogous to the extent of liability in the tort of negligence, and hence may be appropriate for breach of a guarantee of due care, but may be too broad where strict compliance is required. See also Paterson, above n 3, at 276–9.

12 The titles of the various Acts, like their content, are not uniform. The relevant acts in each jurisdiction are as follows: Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW); Personal Injuries (Liabilities and Damages) Act 2003 (NT); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic); and Civil Liability Act 2002 (WA). For convenience, each of these Acts will be referred to in shorthand form as the CLA (NSW), CLA (Qld) etc.

consumer plaintiff to show that the defendant service supplier acted without due care and skill, the CLAs on their face apply to such statutory claims. All the Acts set out general principles applying to claims arising *from a failure to take reasonable care*, irrespective of whether such claims are brought in tort, contract *or under statute*.[13] Therefore, subject to certain general exclusions to the operation of each Act,[14] claims under statute will be governed by the relevant state CLA. I am assuming for the purposes of analysis that a failure to act with 'due care and skill' equates to a breach of duty of care in negligence. That assumption is all the more justified, since the CLAs appear to operate on that basis.[15] Importantly, s 275 of the ACL seemingly allows the continued operation of state laws that apply to the careless supply of services under a contract.

Section 275 of the ACL

Background

Section 275 states:

> Limitation of liability etc
> If:
> (a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and
> (b) the law of a State or a Territory is the proper law of the contract;
>
> that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.

This is a complex section, and all of the difficulties of the terminology used in it cannot be explored here. To simplify, the effect of the section appears to be to make the CLAs applicable to the statutory claim under the ACL. In other words, s 275 engages any law, of the state that is the relevant 'proper law of the contract', that 'applies to limit or preclude liability' under a claim on the contract. As will be seen from the discussion below, the likely effect of s 275

13 CLA (ACT): see Ch 4, s 41 ('negligence claims'). CLA (NSW): see s 5A (Part applies to claims for harm resulting from negligence, regardless of the precise cause of action pleaded to sustain such a claim). CLA (Qld): see Ch 2, Pt 1 (most sections apply to 'breach of duty of care', defined to include claims in contract or under statute, though Div 4 on dangerous recreational activities applies only to 'negligence' suggesting that breaches of contractual duties of care *are not within the scope* of the Division: see R J Douglas, G R Mullins and S R Grant, *The Annotated Civil Liability Act 2003 (Qld)*, 2nd ed, LexisNexis, Sydney, 2008, p 167, at [19.5]). CLA (SA): see Pt 6 (which is limited to claims in negligence, defined as a 'failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care'). CLA (Tas): see s 10 (claims for breach of duty of care); CLA (Vic): see s 44 (negligence claims 'regardless of whether brought in tort, in contract, under statute or otherwise'); CLA (WA): Pt 1A purports to apply to all claims for damages for harm caused by the fault of another (s 5A(1)). See J Dietrich, 'Duty of Care' (2005) 13 *TLJ* 17 at 21, for some of the difficulties in relation to the WA provisions.

14 Those exclusions are not relevant for current purposes.

15 Eg, the definition in the CLA (Qld), Schedule: 'duty of care means a duty to take reasonable care or to exercise reasonable skill (or both duties)' appears to cover differently worded formulae.

of the ACL is that the various CLAs that *directly* limit or preclude liability for careless conduct, including breaches of the statutory guarantee of due care and skill, will be effective and applicable.

Some background is needed in relation to this section to understand its purpose and effect. The wording of s 275 is almost identical to that of the previous s 74(2A) of the TPA, other than seemingly minor changes to the wording to reflect the change from implied terms to statutory guarantees.[16] Section 74(2A) was introduced in 2004 for the express purpose of permitting the operation of *state* provisions that limit liability for breach of the implied term of due care in contract. The Supplementary Explanatory Memorandum to the Treasury Legislation Amendment (Professional Standards) Act 2004, which included s 74(2A) (and its equivalent in the Australian Securities and Investment Commission Act (Cth)), stated:

> 1.3 Other provisions which are similarly capable of being used as an alternative to negligence in a wide range of circumstances are those in the Trade Practices Act and the Australian Securities and Investments Commission Act 2001 which imply into contracts an obligation to supply services with 'due care and skill', a concept which has remarkable similarities to the duty of care required by the law of negligence.
>
> 1.4 While contract law is ordinarily dealt with by the State and Territories, the Commonwealth has been provided with legal advice that the effect of the High Court's decision in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* is that actions in contract based on a breach of the condition that services be provided with 'due care and skill' would not be subject to any limitations which might be applied by a State and Territory to contractual remedies.[17]

Certainly, the assumption of the legislators is that s 275 will be to like effect, although interestingly and perplexingly, the focus of the rationale for this section is much more narrowly stated in the Explanatory Memorandum to the ACL:

> Limitation of liability for recreational services
>
> 7.136 The States and Territories currently have laws that allow providers of recreational services to exclude or limit their liabilities in respect of implied conditions and warranties in consumer contracts. It is expected that the States and Territories that currently have such laws in place will choose to have similar laws that exclude liability in respect of consumer guarantees.

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16 Section 74(2A) of the TPA stated:

> If:
>
> (a) there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and
>
> (b) the law of a State or Territory is the proper law of the contract;
>
> the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.

17 See more fully the Supplementary Explanatory Memorandum to the Treasury Legislation Amendment (Professional Standards) Act 2004 at [1.1]–[1.5]. To similar effect is the Consideration in Detail Speech, cited in *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641; 268 ALR 570; [2010] NSWCA 137; BC201003933 at [44] per Spigelman CJ, and see the discussion in more detail of the background to the amendments, at [37]–[46].

> 7.137 The ACL provides for such laws to have effect to limit the guarantees provided for in Chapter 3, Part 3-2, Division 1, Subdivision B of the ACL. [Schedule 1, item 1: Ch 5, Pt 5 4, Div 3, s 275].[18]

But is s 275 (and was its predecessor s 74(2A)) successful in allowing the various state laws to operate in this context?

This brings us to *Insight Vacations Pty Ltd v Young*,[19] in which the plaintiff was injured while on a bus tour during an overseas holiday. The injury was caused by the driver's negligence. It was held that the driver's conduct amounted to a breach of the defendant's contract, specifically of the implied term of 'due care' under s 74 of the TPA. The defendant relied on a clause in the contract that sought to exclude liability for breach of s 74, and relied on NSW law that allowed such exclusion clauses.[20]

The High Court concluded in a unanimous joint judgment of French CJ, Gummow, Hayne, Kiefel and Bell JJ that s 74(2A) operated to pick up and apply 'as surrogate federal law'[21] only a state law that *of itself* applies to limit or preclude liability.[22] In other words, s 74(2A) allowed state laws to directly limit rights of consumers via the CLAs, such as the sections in some states that deal with dangerous recreational activities. The High Court also held, however, that s 74(2A) did not allow inconsistent state laws that do not directly limit liability but merely allow for the exclusion of liability by the parties to a contract themselves, by means of that contract.[23]

Assuming that s 275 of the ACL has a similar effect as s 74(2A) of the TPA, then *in the absence of s 275*, any restrictions on liability contained in state CLAs that are not replicated in the ACL or the CCA would be invalid insofar as they apply to corporations and are inconsistent with the ACL or CCA. This follows from the previous case law on inconsistency, such as *Wallis v Downard-Pickford (North Queensland) Pty Ltd*,[24] as well as *Insight*.

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18 See Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 at [7.136]–[7.139], pp 208–9.

19 (2011) 243 CLR 149; 276 ALR 497; [2011] HCA 16; BC201102833.

20 See s 5N of the CLA (NSW). For criticism of the NSW provision, see J Carter and E Peden, 'A contract law perspective of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) (2002) 54 *Plaintiff* 19.

21 (2011) 243 CLR 149; 276 ALR 497; [2011] HCA 16; BC201102833 at [12].

22 Ibid, at [12], [35]–[36].

23 Section 74(2A) of the TPA did not pick up and apply a law such as s 5N:

> which in its terms does not limit or preclude liability for breach of contract. In terms, 5N does no more than permit the parties to certain contracts to exclude, restrict or modify certain liabilities . . . [ibid at [26], footnotes omitted].

5N CLA (NSW) allows for exclusion of liability in relation to 'recreational services' supplied 'in connection with or incidental to the pursuit of any recreational activity' (subs (4)). It was accepted by the High Court that the bus tour came within such definition [(2011) 243 CLR 149; 276 ALR 497; [2011] HCA 16; BC201102833 at [19]]. Under the TPA, however, 'bus tours' fell outside the narrower definition of recreation services contained in s 68B (and now in s 139A CCA). Hence, s 68B did not operate to allow exclusion of liability. Accordingly, the exclusion clause would be void, unless s 74(2A) 'picked up' s 5N and applied it as Federal law, thus allowing the NSW provisions to operate [(2011) 243 CLR 149; 276 ALR 497; [2011] HCA 16; BC201102833 at [7]], which it did not.

24 (1994) 179 CLR 388; 120 ALR 440; 68 ALJR 395; BC9404868.

The High Court in *Wallis*[25] took a broad approach to the question of inconsistency between the previous TPA and state legislation, such that any limitation of liability in state legislation would be inconsistent with the full (and under s 68, non-excludable) contractual liability for breach created by s 74. In that case, Queensland legislation limited the liability of a carrier of goods to a certain monetary sum in specific circumstances. When goods were damaged in transit, the plaintiff claimed more than that sum, relying on a breach of s 74 (and the non-excludability of such implied term by s 68). The High Court held that the provisions of the Queensland legislation were inconsistent with s 74 and s 68. Section 74 carried with it a full contractual liability for breach that the Queensland legislation sought to limit.[26]

The ramifications of s 275

If the High Court's reasoning in relation to s 74(2A) of the TPA applies equally to s 275 of the ACL, and there do not appear to be any reasons why it should not, then important consequences follow for the overall scheme of the ACL and the uniformity of that scheme. Given that the CLAs differ among the various state jurisdictions, there is accordingly no uniformity in determining precisely the circumstance in which a remedy is available for personal injury or property damage that results from a breach of the s 60 guarantee. The lack of uniformity (and hence diversity of approach) is endorsed by s 275 of the ACL.

As a result of s 275, it is therefore likely that individual state provisions that restrict liability continue to operate in each jurisdiction. These would apply equally to corporate suppliers. Restrictions on liability include even general defences, such as contributory negligence and voluntary assumption of risk, which are probably only effective as a result of s 275. If s 275 did not apply state laws, then a contributorily negligent consumer, for example, injured by the supplier's careless supply of services, could ignore a claim in tort and proceed under s 267, arguing that any state law restrictions are inconsistent with the rights created under the ACL (and s 131 of the CCA), at least so far as corporate supplier of services are concerned.[27] These general defences, though broadly similar in the different CLAs, are not dealt with in an entirely

25 Ibid.

26 Ibid, at CLR 396 per Toohey and Gaudron JJ (Deane, Dawson JJ and McHugh JJ concurring). Since s 68 stated that a *term of a contract* that limited liability was void and said nothing about state legislation having such effect, it could have been argued that s 74 implied one contractual duty, whereas the Queensland legislation merely limited the damages payable as a result of any breach of contract. Nonetheless, such arguments were not accepted by the High Court.

27 The CCA does not have any applicable contributory negligence defence. It does have contributory negligence defence provisions that apply to claims for damages under s 236 for contraventions of Chs 2 and 3 of the ACL, including, s 18, (s 137B of the CCA) and in relation to defective goods claims against a manufacturer under ss 138 and 139 of the ACL (s 137A of the CCA). Interestingly, these are contained in the CCA rather than the ACL, but are still stated to apply to persons and not just corporations.

Under the previous TPA claims for breach of the implied term of due care and skill were not, *it would appear*, subject to contributory negligence defence, though I am not aware of any authoritative decision on point. See, eg, *Renehan v Leeuwin Ocean Adventure Foundation Ltd* (2006) 17 NTLR 83; 151 NTR 1; [2006] NTSC 4; BC200600022, in which the plaintiff participated in training activities on an adventure sail training ship, the *Leeuwin*,

uniform way. Further, specific defences adopted in some jurisdictions, such as those dealing with 'obvious risks' and dangerous recreational activities, can also only operate via s 275. Here, the lack of uniformity is most pronounced. For example, if a consumer is injured while engaged in dangerous recreational activities, the supplier of such services can potentially defend such a claim in New South Wales on that basis, even where such a supplier was negligent, whereas in Victoria it cannot.

Why the legislatures have not considered uniformity to be desirable in the context of such potentially serious consequences is puzzling. That consumer protection is sufficiently important to warrant uniformity is understandable; why consumers of *services* should be subject to the vagaries of individual state laws is not clear, though politics and a lack of consensus among governments may be the underlying cause. Of course, it may be desirable that claims for carelessly caused injuries are dealt with consistently, irrespective of whether they are brought in negligence or for breach of s 60. The technicality of bringing such a claim under ss 60 and 267 should not alter that need for consistent treatment. But that consistent treatment *within* states of all claims for carelessly caused injuries leads to *inconsistency* and lack of uniformity *between* different states. This lack of uniformity is so even if Commonwealth jurisdiction applies. Ultimately, that lack of uniformity is a result of the failure of the states to agree on a uniform CLA regime, and that is a regrettable state of affairs. It is interesting that the new ACL has not circumvented such inconsistency.

One difficulty with s 275 is its use of the term 'proper law of the contract'. This is odd terminology, since the CLAs focus on careless conduct, and may thus be limited in their operation to conduct that occurs within the jurisdiction. So what happens where a supplier carelessly supplies services to a consumer in Victoria, but the proper law of the contract is New South Wales? Must the proper law of the contract be the same as the place in which the services are supplied? Would the relevantly applicable CLA be that of New South Wales (according to s 275, yes), but is this possible since the CLA (NSW) is unlikely to have extra-territorial operation?[28] These questions may well need to be addressed in more complex cases that could arise.[29]

One further issue in relation to the lack of uniformity arises in relation to

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owned by the defendant. She suffered injury when she fell off the main mast. It was held that the owner of the ship had entered a contract for the supply of services and that this therefore included an implied term that the services were to be provided with due care and skill. The defendant had failed to do so, in not having a system in place to ensure that the plaintiff's belt was properly secured. Importantly, the exclusion clause contained in the contract was held to be void under s 68 of the TPA and thus the defendant could not rely on it. Hence, the defendant was held liable. Further, no contributory negligence defence was considered to be available in the circumstances either, though the reason for this was not clearly explained.

28 This is so because of the conclusion reached in *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; 276 ALR 497; [2011] HCA 16; BC201102833 at [35] that sections of the CLA (NSW) that preclude liability in relation to recreational services only apply to the supply of services in New South Wales, regardless of where the contract for that supply was made 'and by whatever law it is governed'.

29 One possible solution to this problem is that the various CLAs could be amended to include extra-territoriality provisions such as to apply the Acts to services supplied under contracts of which the state is the proper law, irrespective of where the services were performed (my thanks to the anonymous referee for this suggestion). This could create further problems,

the exclusion of liability for failure to comply with the statutory guarantees.

Are state laws that allow for the exclusion of liability for breaches of statutory guarantees still capable of operation?[30]

The statutory guarantees cannot *generally*[31] be excluded as a result of s 64 of the ACL:

> Guarantees not to be excluded etc by contract
>
> (1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:
>
> (a) the application of all or any of the provisions of this Division; or
> (b) the exercise of a right conferred by such a provision; or
> (c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.
>
> (2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with the provision.

Critically, however, it is possible under the CCA to exclude the guarantees in relation to services in one context, namely, recreational services. In December 2002 s 68B was inserted into the TPA. This earlier provision allowing for the exclusion of liability has now been replaced by s 139A of the CCA, which is to the same effect. The stated purpose of s 68B of the TPA was to 'permit self-assumption of risk by individuals who choose to participate in inherently risky activities, and [to] allow them to waive their rights under the' TPA.[32] The section allowed for the exclusion of the implied term of 'due care' where 'recreational services' were provided.

Section 139A allows for the exclusion of the statutory guarantees in relation to services contained in the ACL, in particular, ss 60 and 61. Such a term is not void under s 64 of the ACL to the extent that it 'excludes, restricts or modifies' such a statutory guarantee (s 139A(1)), so long as such exclusion is limited to liability for death or physical or mental injury. Injury includes the acceleration or aggravation of injury or a disease (subs (3)). The definition of recreational services is as follows:

> (2) *Recreational services* are services that consist of participation in:
>
> (a) a sporting activity or a similar leisure time pursuit; or

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however, since it could mean that two CLAs both apply to the same services, ie, that of the state in which the services were supplied and that of the state in which the services were performed.

30 I have previously discussed the issue of recreational services specifically in J Dietrich, 'Liability for Personal Injuries from Recreational Services and the New Australian Consumer Law: Uniformity and simplification, or still a mess' (2011) 19 *TLJ* 55. Although I erroneously stated in that article that the relevant remedies section for breach of s 60 of the ACL was s 236 of the ACL, rather than s 267 of the ACL, and made some other errors consequential on this mistake, the broad arguments made in that article are still valid.

31 Note, however, s 64A(2) of the ACL which allows some *limitation* of liability for contracts of service other than for personal, domestic or household use.

32 Explanatory Memorandum provided with the Trade Practices Amendment (Liability for Recreational Services) Bill 2002. For a more detailed consideration of the background to the legislative changes, see A Haly, 'The Trade Practices Amendment (Liability for Recreational Services) Act 2002: Complete solution or deficient response?' (2003) 11 *CCLJ* 1.

(b) any other activity that:

(I) involves a significant degree of physical exertion or physical risk; and

(II) is undertaken for the purposes of recreation, enjoyment or leisure.

Importantly, subs (4) does not allow for the exclusion of liability for reckless conduct, defined in subs (5). One complication that arises from s 139A is this: any state law that seeks to allow for exclusion of liability in *wider* terms would be invalid after the decision of *Insight*, assuming, of course, that the same conclusion that the High Court reached in relation to s 74(2A) applies equally to s 275. There is no reason that it should not. At present, however, only Victoria has legislated to allow for the exclusion of liability for non-compliance with the statutory guarantees. Although the provisions *are in similar terms* as the CCA, they are more onerous in setting out *how* a supplier can exclude liability, that is, they are *narrower* than s 139A. Specifically, such an exclusion must be in the prescribed form set out in the Schedules to the Fair Trading (Recreational Services) Regulations 2004 and must have been brought to the attention of the consumer (s 32N(2) of the FTA (Vic)). What if a defendant corporation seeks to exclude its liability for negligence for recreational services provided to a consumer in Victoria, but has not complied with these presumed requirements? (There is no issue of inconsistency with Commonwealth laws if Federal jurisdiction is not activated, that is, if the supplier is not a corporation.) Section 139A of the CCA would allow the defendant to exclude such liability but the Victorian legislation, which also governs, would not. Is there an inconsistency between the two provisions such that s 139A will prevail, or does s 275 of the ACL pick up the Victorian legislation? *Insight* does not necessarily deal with this because it deals with the indirect exclusion of liability in *broader* circumstances. Thus, in light of the High Court's decision, it is not clear whether the Victorian provisions are inconsistent with s 139A.[33]

Interestingly, the narrowly stated purpose of s 275 of the ACL was to give effect to state

> laws that allow providers of recreational services to exclude or limit their liabilities in respect of implied conditions and warranties in consumer contracts [and it was] expected that the States and Territories that currently have such laws in place will choose to have similar laws that exclude liability in respect of consumer guarantees.[34]

This has not occurred outside of Victoria. Neither the CLA (NSW) (s 5N) nor the CLA (WA) (s 5J) has as yet been amended to change its exclusion provisions, which are still drafted in terms of the exclusion of liability *for breach of implied contractual terms*. Until such time as they are amended, the

33 Section 139A of the CCA allows for the contractual exclusion of liability and thus reinstates the common law contract principles (namely, freedom of contract) that are otherwise disallowed by s 64 of the ACL. Arguably, then, the Victorian legislation only places a limit on the *common law* right generally to exclude liability. Once the s 139A threshold has been met, it could be argued that it is not inconsistent with s 139A to place further requirements to the exclusion of liability. Obviously, however, the issue remains an open one.

34 See Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 at [7.136], p 208.

issue of inconsistency will not arise. However, if they should be amended in the spirit of the current, redundant, NSW provision, then problems may arise. Section 5N allows for the exclusion of liability for recklessness, whereas s 139A of the CCA does not. If s 5N were amended to apply to breaches of statutory guarantees, then any consumer who is injured by recklessness, for which liability has been sought to be excluded by contract and justified by s 5N, could argue that that section is inconsistent with s 139A of the CCA's more limited operation (not extending to recklessness). It should therefore be rendered void by s 64 of the ACL. In other words, should the NSW and WA legislatures seek to re-instate exclusion provisions that are in different terms to those of s 139A of the CCA, then the potential for inconsistency again arises and the reasoning of *Insight*, if applicable to s 275 of the ACL, would invalidate such attempts so far as they apply to corporations.

One final point is worth noting. When we move away from the guarantee of due care and skill and consider other statutory guarantees in relation to services, the legal position changes and the ACL does operate uniformly. The position under s 60 can be contrasted with the operation of s 61.

Fitness for purpose: s 61

A further statutory guarantee, though perhaps of less likely relevance to contracts for the supply of services, is the guarantee that services are fit for their purpose.

> 61 Guarantees as to fitness for a particular purpose etc
>
> (1) If:
>
> (a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and
>
> (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;
>
> there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose . . .

Subsection (2) is similar in effect as subs (1) but in relation to consumers making known 'the result that the consumer wishes the services to achieve'. The guarantee does not apply if the consumer did not rely, or it was unreasonable for the consumer to rely, on the skill and judgement of the supplier.

A breach of the guarantee that services are fit for their purpose (if a particular purpose is made known) would not usually be based on a finding of carelessness, but instead on a failure of the services to fulfil that purpose, even in the absence of any carelessness. In those circumstances, a statutory claim under the ACL has an advantage in that there is no need for a consumer to prove a lack of care. Instead, a failure to comply imposes strict liability, irrespective of fault.[35] In such a case, the CLA provisions dealing with liability

35 Cf *Crawford v Mayne Nickless Ltd (t/as MSS Alarm Service)* (1992) 59 SASR 490, a claim for breach of s 74(2) of the TPA (the previous fitness for purpose implied term), in which there was no discussion of whether the supplier had acted with due care in the court's determination of the question of breach.

and defences would not apply, even if the claim is for personal injury.[36] It is difficult, however, to think of realistic examples of how unfitness for purpose can lead to physical injury. One might be where a consumer seeking exercises to alleviate back pain is given exercises that in fact lead to back injury. In such a case, it would not matter whether the prescription of the exercise was carelessly made or not.

Conclusion

The stated goal of uniformity of Australia's consumer protection laws has not been achieved in relation to all matters covered by the ACL. In particular, the consequences of a breach of s 60 of the ACL are governed by individual state and territory laws found in each jurisdiction's CLA and these set out different legal regimes for determining liability for careless conduct (including statutory claims based on proof of negligence) and set out different applicable defences. As long as the various CLAs are not uniform, the hope for a simplified and uniform regime of liability has not been achieved, at least so far as claims for consequential losses are concerned. Obviously, the best solution to this problem would be for the states and territories to reach agreement on a uniform civil liability regime, as was the intention of the authors of the Ipp Report, on which the civil liability legislation was largely based, from the outset.[37] But the likelihood of this occurring in the medium-term future appears remote given that the ACL process has not resulted uniform solutions.

36 One question is whether limitations and caps on personal injury damages under the CLAs still apply to injuries not caused by carelessness. These are not identical from jurisdiction to jurisdiction. Presumably, since these still form limits on claims for personal injury (even if not carelessly caused injury: see, eg, s 50 of the CLA (Qld)), then s 275 of the ACL would give effect to those limitations.

37 *Review of the Law of Negligence Final Report*, October 2002. The *Report* can be accessed at: <//revofneg.treasury.gov.au>. See in particular Recommendation 1, pp 1 and 26.